UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Research Foundation of the City University of New York
Employer

- and - **Case No. 2-RC-22721**

Professional Staff Congress/City University of New York
Petitioner

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

1. *DECISION OF JUNE 29, 2004*

On June 29, 2004, I issued a Decision and Direction of Election in this matter in which I directed an election in the petitioned-for unit.[1] The Board had previously held in *Research Foundation*, 337 NLRB 965 (2002), that Research Foundation of the City University of New York ("RF" or "Employer") is not exempt from the Board's jurisdiction as a political subdivision under Section 2(2) of the Act, as distinguished from CUNY, an exempt public university. Noting that the Board has exerted jurisdiction over RF as a separate and distinct entity from CUNY, I found that the graduate students in issue were not students of RF and were part of a unit of all employees employed at the Employer's graduate center facility. It appears that the overwhelming majority of graduate students included in the petitioned-for unit are students who attend CUNY.[2] Accordingly, as I had found that the CUNY graduate students were not students of the Employer, I did not need to reach the issue of whether the students were "employees" within the meaning of the Act, as discussed in *New York University*, 332 NLRB No. 111 (2000).

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[1] I found that the following constitutes an appropriate unit for purposes of collective-bargaining: all full-time and part-time employees employed by the Employer at the Graduate Center; but excluding all confidential employees, managers, guards and supervisors as defined by the Act. Approximately half of the unit is comprised of classifications other than "research assistant." The Employer argued that many of these employees should be excluded because they were either managerial, supervisory or temporary. These contentions were considered and rejected in my initial decision.

[2] A number of the graduate students working at RF as research assistants attend other schools.

2. *AFTERMATH OF BROWN UNIVERSITY DECISION*

On July 13, 2004, the Board, in *Brown University*, 342 NLRB No. 42 (2004), dismissed a petition seeking an election in a unit of graduate students who were employed as research assistants, teaching assistants and proctors at that University. On July 27, 2004, the Employer filed a request for review of my initial decision with the Board arguing that "[a]lthough separate entities, CUNY and [RF] share a common mission – to provide, enable and enhance the academic experience and opportunities of CUNY's students, including the doctoral candidates at issue herein." Given that shared mission, the Employer claimed that *Brown* leaves no doubt that the graduate students in the instant case are not employees within the meaning of the Act and that they should not be included in the unit found appropriate. [3]

On September 8, 2004, in light of the Employer's request for review, I issued an Order Reopening the Record, to permit the introduction of further evidence relevant to the contentions which the Employer raised before the Board in its exceptions.[4] A hearing was thereafter held before a Hearing Officer on various dates from December 2004 through January 2005.[5]

Having considered the issue in light of the additional record made in this case, I conclude that the graduate students hired by the Employer as research assistants at the Graduate Center of CUNY are appropriately included in the petitioned-for unit because the decision in *Brown* is distinguishable on the facts in the record in this matter and that it is appropriate to direct an election in the petitioned-for unit.

3. Brown Is Inapposite

The issue presented to the Board in *Brown* was whether the graduate students who are admitted into a university, and for whom supervised teaching and research is an integral component of their academic development, must be treated as employees of the university for purposes of collective bargaining under Section 2(3) of the Act.

That issue is not presented in the instant case, because the graduate students are admitted into CUNY and not RF. In my view, the Board in *Brown* could not possibly have meant that graduate assistants admitted into an educational institution cannot be employees of another employer. In accordance with the Board's prior decision in *Research Foundation,* the Employer is a separate and distinct entity from CUNY. Thus, the concerns addressed by the Board in *Brown* are irrelevant to the resolution of the issues in the instant case. Even assuming that the primary mission of the Employer at the Graduate Center is to serve the interests of CUNY and that this is a relevant

[3] On August 17, 2004, the Professional Staff Congress/City University of New York ("the Union") filed a statement in opposition to the request for review.

[4] The parties requested that the hearing be postponed to allow them the opportunity to explore stipulations and possibly, resolution of this matter without further Board intervention.

[5] After the hearing closed, the Employer requested an extension of time to submit briefs, and an extension was granted to February 11, 2005. The Employer did not file a brief on the facts presented pursuant to the Order Reopening the Record. The brief submitted by Petitioner was duly considered. In addition, the briefs submitted to the Board in the Employer's request for review and Petitioner's opposition have been duly considered.

consideration in determining whether the research assistants employed by the Employer are employees, this case remains outside the dictates of *Brown,* because CUNY is a public institution. The core rationale of the Board in deciding *Brown* is that the relationship between a research university and its graduate students is fundamentally an educational one and not an economic one. Here, the educational relationship is between the graduate students and a public university, which is exempt from the Board's jurisdiction and where collective bargaining for graduate students is not uncommon.[6] Thus, I cannot agree with the Employer's argument. The Employer insists that the graduate students are not employees within the meaning of Section 2(3), under *Brown*, and at the same time, refuses to acknowledge that the educational link in this case is with an exempt entity under Section 2(2) of the Act.

Further, a significant factor considered by the Board in refusing to grant the students employee status under the Act, concerned the fact that *Brown* treated funds for research assistants, teaching assistants and proctors as financial aid and made such representations in university-wide or departmental brochures. Graduate student assistants received a portion of their stipend award twice a month, and the amount of the stipend received was the same, regardless of the number of hours spent performing services.

In contrast, the work performed by the graduate students in the instant case does not appear to be financial support to them as students, irrespective of whether they perform services as research assistants. In that regard, the record substantially demonstrates that research assistantships offered by the Employer are not considered part of the financial aid packages offered to CUNY students[7]. As an example, Philip Kasinitz, CUNY's chairman of the sociology program at the Graduate Center, testified that the research assistantships available on sponsored programs administered by the Employer are not the same as the research assistantships included in the financial aid packages that he designs for the students in his department.[8] Similarly, Joshua Freeman, CUNY's chairman of the history program at the Graduate Center, testified that a variety of fellowships and grants are available to students as financial aid, however, work performed on sponsored programs is considered "outside employment." Finally, Kristin Lawler described the financial aid package that she received from CUNY when she was a graduate student, as being a mix of tuition waivers and fellowships; whereas, she obtained the work that she performed as a research assistant for the Employer separately.

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[6] *Brown* applies exclusively to private universities. As the Board explained, "[a]lthough under a variety of state laws, some states permit collective bargaining at public universities, we choose to interpret and apply a single federal law differently to the large numbers of private universities under our jurisdiction."

[7] In the initial decision, I noted that one individual, Alicia Athonvarangkul, received tuition remission at CUNY for her work at the Employer's Ralph Bunche Institute for International Studies.

[8] Even though most of the fellowships request that the students "do service" through a modest number of hours, the real function is to provide CUNY students with money. In contrast with RF, time sheets for work performed as part of the financial aid package are not required. In some instances, the "financial aid work" is covered by the PSC/CUNY collective-bargaining agreement.

Lastly, it was undisputed in *Brown*, that all the petitioned-for individuals were students who must first be enrolled at *Brown* to be awarded a teaching assistantship, research assistantship or proctorship. Even students who had finished their coursework and were writing their dissertations must have been enrolled at *Brown* to receive their awards. In the instant case, however, Kasinitz testified that non-CUNY graduate students also worked on the grants administered by the Employer. As the principal investigator on a project called "The Second Generation in Metropolitan NY" which is a sponsored program at the Graduate Center, Kasinitz supervised about 25 to 30 research assistants working on the grant. He maintained that about half of the "interviewers" were non-CUNY graduate students.[9]

In conclusion, the graduate students at issue here are "employees" within the meaning of Section 2(3), despite their status as CUNY students, because they have essentially an economic relationship with the Employer.

4. DOES THE EMPLOYER'S POSITION REQUIRE THAT JURISDICTION BE REEXAMINED?

In its submissions, the Employer argues that *Brown University* applies in this situation, because it has a "shared mission" with CUNY. It asserts that with respect to sponsored research conducted by graduate students, the relationship between it and CUNY is "symbiotic". The record establishes that while paychecks for research assistants are generated by the Employer, the students are performing services under the supervision of CUNY professors. The lengthy and detailed contract between the Employer and CUNY specifically attempts to create separate and distinct entities. Nonetheless, the Employer claims that to determine the employee status of the graduate students, it should be treated as the educational institution itself because it acts in furtherance of the educational mission of CUNY. To the extent that the Employer's position invites a reexamination of the Board's jurisdiction in this matter, I find it unnecessary to do so.

The threshold issue in the Board's 2002 *Research Foundation* decision, supra, was whether the Employer is exempt from the Board's jurisdiction as a political subdivision under Section 2(2) of the Act. The Employer is responsible for the post-award fiscal administration of grants and contracts that have been awarded to CUNY, an exempt entity. The Board found that the Employer is a private, not-for-profit educational corporation and specifically rejected the Petitioner's argument that since the Employer serves only CUNY, was created to serve CUNY, and is controlled by CUNY, it is part of CUNY and can be characterized as an administrative arm of CUNY. In asserting jurisdiction, the Board noted that the Employer operated as a private corporation for nearly 40 years. The Board stated that "[i]n addition, the record demonstrates that [RF] operates independently of CUNY's control. While performing services for CUNY, [RF]…maintains direct and independent control over its employees…"

In my initial decision, I found that the Employer was a separate entity because the record demonstrated that the underlying facts established in the prior *Research Foundation* case had not changed. In that case, the Board applied the test enunciated

[9] RF claims that CUNY students working at RF should not be considered employees under *Brown*; however, it concedes that non-CUNY students who are performing the same work may be employees within the Act.

by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971), wherein the Court found that in determining whether an entity is a political subdivision, it is to the "actual operations and characteristics" of the entity that the Board must look in deciding whether the entity is exempt from the Act's coverage. The *Hawkins County* two-pronged test limits the Section 2(2) exemption to entities that are either 1) created directly by the state, so as to constitute departments or administrative arms of the government, or 2) administered by individuals who are responsible to public officials or to the general electorate. It is undisputed that the Employer was created under Section 216 of the New York Education Law, as a not-for-profit corporation and that its by-laws define appointment to the board of directors who are not subject to removal by the public officials. The Board, however, did not reach the issue of whether the *Hawkins County* test could be satisfied through a single employer analysis.

In the instant case, the Employer's argument is that it shares a "common mission" with CUNY. This argument suggests that a single employer relationship exists and if so, a single employer analysis would be required.[10]

The Board uses four criteria to determine whether a single employer relationship exists: 1) common ownership; 2) common management; 3) functional interrelation of operations; and 4) centralized control of labor relations. It is well established that not all of these criteria need to be present to establish single employer status. *Mercy Hospital of Buffalo*, 336 NLRB 1282 (2001). Additionally, neither of these factors is controlling. *JMC Transport,* 283 NLRB 554, 555 (1987). Below is a summary of the additional evidence adduced at the hearing held pursuant to my Order Reopening the record.

The supervisors of the research work performed under the Employer's aegis are the principal investigators, and these investigators are primarily members of the CUNY faculty performing research in furtherance of their professional duties. The principal investigators hire, fire, reward, promote and direct the Employer's employees and implement the conditions of their employment.[11] Graduate student Denise Ingram, who was employed by the Employer, testified that her work as a research assistant in the Center for the Study of Philanthropy was performed under the direction of Eugene Miller, a CUNY faculty member. During the last two months of her employment, Miller informed her that she would be paid through CUNY because the grant money that was funneled through the Employer had expired. Similarly, Kimberley Warner-Cohen, a full-time office worker employed by the Employer, is paid for half of her salary by CUNY and half by the Employer.

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[10] However, the Employer is seeking dismissal of this petition based on *Brown*, rather than on jurisdictional grounds. Without any case support, the Employer appears to argue that while *Hawkins* requires a finding that it is a private, separate entity, the research assistant's function vis-à-vis the Employer's mission implicates *Brown*. However, the "common mission" analytical framework is applied only to the *Catholic Bishop,* 440 U.S. 490 (1979), line of cases where the Board's exercise of jurisdiction could present a significant risk that the First Amendment will be infringed. *See also*, *St. Edmund's Roman Catholic Church*, 337 NLRB 1260 (2002); compare *Hanna Boys Center*, 284 NLRB 1080, enfd. 940 F.2d 1295 (9th Cir. 1991).

[11] The principal investigators are paid by CUNY for work performed on research through "release time," whereby the faculty member is relieved of teaching hours in order to perform research.

Finally, with respect to centralized control of labor relations and integration of operations, the record establishes that CUNY's absorption of the Employer's employees who worked at the University Application Processing Center (UAPC) may be illustrative of the relationship between these two entities. UAPC is mainly located at Kingsborough College in Brooklyn and is responsible for processing undergraduate applications and various ancillary functions – all of which involve inputting data into computers. UAPC had a combination of employees who were CUNY employees and whose salaries were funded through tax levy, and other employees who were employed by the Employer. The Employer administered a contract with the New York City Department of Education to provide New York City high schools with computerized support to meet student record-keeping services.[12]

On October 21, 2002, the Petitioner filed a petition for all employees working at UAPC. On December 19, 2002, Region 29 issued a Certification of Representative to Petitioner. In January 2004, after about a year of bargaining without reaching an agreement, the Employer notified Petitioner that the funding for UAPC might end. Petitioner's president, Barbara Bowen, called Matthew Goldstein, the chancellor of the CUNY, who is also the Employer's chairman of the board, to discuss alternatives for the UAPC employees. Goldstein responded that he had reached out to City officials and was exploring ways to sustain the grant.

At an April 2004 meeting, conducted at CUNY, representatives of CUNY and Petitioner met.[13] At this point, it was clear that grant would not be extended. CUNY's priority was continuing to get applications processed and to that end, CUNY proffered a draft staffing plan to ensure the continuation of several services critical to CUNY. Of the 92 employees needed for UAPC operations (excluding supervisors), 17 positions were already funded through CUNY. The remaining 75 positions were reclassified as CUNY titles.

Petitioner simultaneously engaged in effects bargaining with the Employer and CUNY officials. This bargaining also included outplacement services within its system.[14] The negotiations resulted in the transfer of annual leave and some accrued sick days for those employees of the Employer who were hired by CUNY.[15] While the UAPC was

[12] The SARK (Student Automated Record Keeping) system mails notification postcards to students' homes, provides report cards, schedules students for classes and interfaces with other Board of Education data systems to provide required management information to the New York City high schools.

[13] Present for CUNY were: vice-chancellor faculty and staff relations Brenda Malone, vice-chancellor and legal counsel Frederick Schaefer, senior vice-chancellor Allen Dorbin and Les Jacobs from UAPC; for the Union: Bowen, executive director Deborah Bell, associate executive director Marion Carlisi, and several employees from UAPC.

[14] In this regard, the UAPC example might be construed as consistent with the line of cases finding that governmental contractors fall outside Section 2(2)'s political subdivision exemption and inside the provision's definition of an employer. *Aramark Corporation*, 179 F.3d 872 (1999).

[15] Notably, the vast majority of RF employees who were hired by CUNY were placed in titles subject to NYS Civil Service Law and, therefore, the employees were covered by District Council 37, AFSCME, AFL-CIO, which is a union that represents mostly public sector employees.

funded by a grant administered by the Employer, CUNY became immersed in labor matters and operational issues. Accordingly, the UAPC situation suggests that CUNY officials may play a major role in the Employer's actions relative to its employees, depending on the nature of the grant involved.

The Employer's argument in this matter is primarily found in its request for review because, as noted above, the Employer failed to file a brief in this matter. As noted, the Employer's arguments could, to some extent, suggest that jurisdiction may be an issue. However, in the absence of case authority holding that one of the prongs of *Hawkins* is satisfied through a single employer analysis, I need not make any finding with respect to whether the Employer and CUNY are single employers.

5. Conclusion

Based on the holding in *Research Foundation*, the Employer is a private entity over which the Board has asserted jurisdiction. For the reasons stated more fully in my initial Decision in this matter, the classifications in the petitioned-for unit constitute an appropriate unit. Further, the single facility presumption, as applied to the Graduate Center, has not been rebutted by the Employer. The record clearly establishes that the principal investigators, the Learning Center director and the other supervisors herein, have significant local autonomy. The record evidence does not support a finding of functional integration or employee interchange between campuses. With respect to the Employer's contentions that the issues relating to the supervisory, managerial and professional employees were incorrectly decided in the initial Decision in this case, I find that the Employer has failed to carry its burden of proof, given the vague and conclusory testimony offered by the Employer's witnesses on those matters. Therefore, I reaffirm the findings and conclusions previously made with respect to those individuals.

Accordingly, I find that the following units are appropriate for the purposes of collective bargaining:

(a) All full-time and regular part-time non-professional employees employed by the Employer at the Graduate Center; but excluding all confidential employees, guards, professional employees, and supervisors as defined in the Act.

(b) All full-time and regular part-time professional employees employed by the Employer at the Graduate Center; but excluding all confidential employees, guards, and supervisors as defined in the Act.

NOTE: (1) The following employees shall cast a challenged ballot in unit (b) as the record was insufficient to make a determination as to their professional status: Caroline Fuchs, Mark Bobrow, Rhonda Johnson, Daisy Edmonson-Alter, and Carol Ann Finkelstein.

(2) The following employees are otherwise eligible to vote in unit (b) but the record was insufficient to establish their supervisory status and they shall cast a challenged ballot: John Spencer, Ellen Noonan, Dolores Buonasora and Amber Johnson.

(3) Anne Kuite shall cast a challenged ballot in unit(a) as the record was insufficient to decide her status as a managerial employee.

6. Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[16] Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[17]

In each case separate elections shall be conducted in voting groups (a) and (b) described above.

The employees in the non-professional voting group (a) in each case shall vote whether or not they desire to be represented for collective bargaining purposes by the Professional Staff Congress/City University of New York.

The employees in the professional voting group (b) in each case will be asked two questions on their ballots:

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[16] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

[17] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **April 5, 2005**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

(1) Do you desire to be included in the same unit as non-professional employees of the Employer for collective bargaining purposes?

(2) Do you desire to be represented for collective bargaining purposes by Professional Staff Congress/City University of New York?

If a majority of the employees in voting group (b) vote "yes" to the first question, indicating a choice to be included in a unit with the non-professional employees, the group will be so included. The votes on the second question will then be counted with the votes of the non-professional voting group (a) to decide the representative for the entire unit. If, on the other hand, a majority of the professional employees in voting group (b) do not vote for inclusion, these employees will not be included with the non-professional employees, and their votes on the second question will be separately counted to decide whether they want to be represented in a separate professional unit.[18]

Dated at New York, New York
March 29 2005

/s/ Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

[18] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-**April 12, 2005.** This request must be received by the Board in Washington by no later than